IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1138 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DR NANDINI YOGENDRA KUMAR MAKWANA

Versus

DEAN

Appearance:

MR JITENDRA MALKAN for Petitioner

Ms. Nandini Joshi, ASSTT. GOVERNMENT PLEADER for Respondent Nos. 1 and 2.

MR DC DAVE for Respondent No. 3

MR AS SUPEHIA for Respondent No. 4, 5, 6, 7

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 16/03/2001

ORAL JUDGEMENT

The Division Bench of this Court vide its order dated 7.3.2000 has directed to hear this petition

on merits within an agreed period of 10 days from the date of order.

By means of this petition, the petitioner has sought for a direction to the respondents to provide reservation with backlog to the person with disability as provided under "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" published in the Extraordinary Gazette of India on 1.1.96 (hereinafter referred to as the "Act") claiming herself for admission in the Post Graduate Degree course in Radiology subject as published in the advertisement dated 22nd January, 2001.

2. The petitioner is a person with disabilities (physical and orthopedical). Her permanent partial disability is assessed at 55%. She was examined by Dr. M.M.Prabhakar, Professor and Head of Department of Orthopaedic, in B.J.Medical College, Ahmedabad. The petitioner has obtained the degree of M.B.B.S. and rendering her services as a tutor in Radiology Department since April, 1998. She was selected and appointed by the Commissionerate of Health and Medical Services and Medical Education (Medical Division) on purely and temporarily ad hoc basis for six months or the post is filled in on regular basis or till further orders, whichever is earlier. The petitioner was also given admission in the Post Graduate Diploma course in Radiology subject on 19th January, 2000. The persons with disabilities have been given not less than 3% protection under the said Act. The respondents are under a statutory obligation to provide reservation with backlog from the date of the enforcement of the Act to the persons with disabilities. The respondents had issued an advertisement inviting applications for admission in the Post Graduate degree course in various subjects including Radiology subject. Though the respondents have given reservation to the candidates belonging to SC/ST and SEBC candidates, but no reservation has been provided for the persons with disabilities. Since 1981, only one post of Post Graduate course in Radiology was given in B.J.Medical college, Ahmedabad for Surat candidates in the Radiology subject. Lateron one post of Post Gradudation in the Radiology subject was opened at Government Medical College, Surat from January 2000. In January, 2000, the respondents have provided reservation to the candidates belonging to SC/ST and SEBC in the aforesaid course. On inquiry, the petitioner was informed that considering the admissions given earlier on roster point was reaching at point no. 34. The petitioner was also informed that the Post

Gradudate course in Radiology subject, Roster operates since 1981. The petitioner would not be entitled for being promoted as Assistant Professor unless the respondets provide reservation to persons with disabilities. If the petitioner is not permitted for the Post Gradudate course degree in Radiology, she would not be entitled for the higher education. The petitioner submitted her application within the prescribed time limit and the interviews for the posts were scheduled to be held on 23rd February, 2000. According to the advertisement, a provision has been made for the admission in degree course and the tutors working in the Government Medical College in any department were also given an opportunity to apply to South Gujarat University, Surat directly with required NOC. The persons with disabilities had not been given any admission in the subject Radiology since 1993 to 2000 and the respondents have not provided reservation to any candidate with disabilities for admission in the post for Gradudate Degree course in all the subjects including Radiology. Hence, for her admission on the basis of reservation as well as backlog, she applied for the admission in the subject Radiology and has prayed for a direction by this petition to the respondents to give reservation with backlog to the petitioner in Radiology subject.

3. Affidavits have already been exchanged.
The contention of the learned counsel for the petiioner is that since the above-said Act has already been passed to provide reservation to the persons with disabilities, but no reservation has been given to the persons with disabilities.

4. The learned counsel Mr. Dave for the
South Gujarat Univesity has contended that the petitioner is not eligible as she does not fulfil the basic eligibility criteria under South Gujarat University, Surat, P.G.Rule No. (Medical Admission): 1 , and referred relevant Rule 1: (a) a candidate is required to have passed Bachelor of Medicine and Bachelor of Surgery Examination of this University or any other college and University of State of Gujarat and recognised by M.C.I. (b) The candidate is also required to complete his compulsory rotation housemanship (internship) period not more than four years after completion of internship and have registered under the Gujarat State Medical Council (d) and 2(d). The candidate must belong to the University of Gujarat and if any person not belonging to the University of Gujarat State would not be eligible to apply. In the mode of selection, Selection for eligible

candidate is required for admission to the first year PG course on the basis of the total marks obtained and its percentage at the final MBBS examination. However, exception is made in Mode of Selection (d) of the Rules. That PG Rule no.1 (d) and II(d) (for clinical subjects) does not apply for those working as Tutors/Jr. Lecturer/Medical Officers/Research post/or any other Government service. Under Rule 4(b)(i) of the Rules, the admission to the Post Gradudate course in decree or diploma in clinical subjects are required to be given on academic merit and academic merits are required to be decided as per State Government Rules for selections for esidents and other equivalent resident posts in Medical College, prescribed from time to time i.e. Stipendary post in Medical college prescribed from time and Non-stipendary post in Clinical subjects. Under P.G.Rule No. 6(4) Students will be offered only one registration at a time i.e. Degree or Diploma. Simultaneous registration will not be given. Students already registered for Diploma in any subject if desires to register in Degree or a student already registered for degree desires to register in Diploma will have to leave the existing registration. Under the provisions for Mode of Selection of P.G.Rule 1, the tutors (Demonstrators) working in the same department will be offered registration first upto the maximum of 1(one) registration per term or two per year. They will be offered according to their seniority in the department. As per the Rules, a candidate must have not passed more than four years after internship. The petitioner is not eligible as she has passed much more time of four years after the internship. As the petitioner has passed her MBBS from other University which does not fall within the State of Gujarat, she is not eligible. The mode of selection regarding tutor would be irrelevant if she is not eligible otherwise. Offers are required to be given only on the basis of the academic merit and she does not possess such academic merit. The petitioner has already opted PG diploma course in the same subject of Radiology. Hence, she cannot jump from one place to another for admission in PG degree course in the subject of Radiology. In this regard, he also relied on the judgment in the case of Bindy Nair vs. M.P.Shah Medical College and others reported in 2000(1) GLH, 417 wherein it has been held that a student who has already opted for one year cannot be permitted to jump to another course.

5. So far as the eligibility criteria is concerned as contended by the learned counsel for the respondents, it is misconceived, inasmuch as the Rules refer to two categories i.e. (1) candidates and (2)

tutors). Admittedly, the petitioner is a tutor. She was not a candidate required to fulfil eligibility criteria under clause 1(a)(b)(c) and (d) and clause (a) of Mode of Selection inasmuch if a person having passed MBBS examination and completed his compulsory rotation housemanship (internship) has passed more than six years as working as a tutor for more than five years would be able to be offered PG Degree course even such person would be seniormost in the Department. Admission of tutor is offered on the basis of seniority which can be said to be on the basis of experience, not on the basis of the total marks obtained and its percentage at the final MBBS examination. So far as eligibility for a person from university other than in Gujarat is concerned, clause (d) of Mode of Selection under P.G.Rule NO.1 says that PG Rule 1(d) and II(d) (for clinical subjects) are not applicable for those working as tutors/Jr. Lecturer/Medical Officer/Research posts or any other Government service. As such, tutors are not required to be persons having passed MBBS examination from university other than in Gujarat, in other words, this eligibility that they must have passed MBBS examination from a university of Gujarat university is not applicable to tutors. The tutors working in the same department are required to be offered registration first upto to the maximum of one registration per term or two per year and the main requirement for this clause is that the offer will be made according to their seniority in the department as required under clause (b) of Mode of Selection of P.G.Rule 1. Clause 4 of the PG Rules Medical Admission : 6 requires that the students will be offered only one registration at a time i.e. Degree or Diploma course. Simultaneous registration will not be given. Students already registerd for Diploma in any subject if desires to register in Degree or a student already registerd for degree desires to register in Diploma will have to leave the existing registration.

In the present case, the petitioner has already registered in Diploma course and this clause itself permits for change of the course either degree or diploma. If one course is adopted or intends to adopt the other one, the registration in other degree or diploma course will have to be left. In case the petitioner is permitted to attend the degree course, the petitioner will have to leave the Diploma course which she has already adopted. The authority relied upon by the learned counsel is not applicable in the facts and circumstances of this case as the facts of that authority are entirely different. As such, the contention regarding eligibility pertains to a candidate are not

applicable to a tutor already working in the same department is not tenable.

6. The learned Assistant Government Pleader for the Government Medical College, Surat contended that the petition is premature unless admission rules are challenged and the petitioner cannot pray for a mandamus directing the respondents to admit the petitioner in the required course on the basis of reservation for handicapped persons. In the Rules for admission, there is no provision for reservation to any of the categories. If there is no reservation for any category, the provisions of the Act would be applicable. Admittedly, there is no provision for admission in the Rules for any of reserved categories. Though the advertisement has provided giving out reservation to vacancies for SC/ST and SEBC candidates, no vacancy for the admission for persons with disabilities has been notified. No question for challenging the Rules therefore, arises as contended. Hence, the contention of the learned AGP therefore, fails. The next contention of the learned counsel for the Government Medical College is that as per Rule 4 of the Rules, disability certificate is required to be issued by a Medical Board constituted by Central or State Government. The Act requires the disability certificate and that certificate must be issued by the Medical Board duly constituted by the Central and State Government. The State Government may constitute a Medical Board consisting of at least three members, out of which at least one shall be a specialist in a particular field for assessing locomotor/visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be. Under Rule 5, the Medical Board is required to issue disability certificate after due examination. In case of such disability, where there are no chances of variation in the degree of disability. Under Sub-rule (5) of Rule 5 the certificate issued by the Medical Board under Rule 5 shall make a person eligible to apply for the facilities, concessions and benefits admissible under schemes of the Government or Non-Government Organisations, subject to such condtiions as the Central or the State Government may impose. In this connection, the learned counsel has also pointed out from the notification dated 20th December, 1976 to the effect that the Government of Gujarat, Health and Family Planning Department vide its resolution dated 20th December, 1976 has constituted a Standing Board at Civil Hospital, Government Medical College, Surat with the following members.

(1) Seniormost professor of Surgery

(2) Seniormost professor of Medicines

(3) Seniormost professor of Orthopaedic

The Seniormost professor amongst the above three would be the President or Chairman of the said Board. The present Act has been enacted in the year 1995 and the same has been notified in the Government Gazette on 1st January, 1996. The learned counsel for the Medical College, could not point out from any material that the Board already in existence constituted pursuant to the Government Resolution dated 20th December, 1976 has been empowered to act as the Board under the provisions of Rules 4 and 5 of the Rules.

7. On the other hand, the learned counsel for the petitioner stated that no board has been constituted under the provisions of the Act orthe Rules framed thereunder.

8. I have carefully examined the contentions of the learned counsel for the parties in this regard. There is nothing on record to show that the Board already constituted pursuant to the Government resolution dated 20th December, 1976 has been authorised to act under Rules 4 and 5 of the Rules. Secondly, the respondents have not challenged the disability certificate dated 14th November, 1995 issued by the Professor and Head of the Orthopaedic Deaprtment, Civil Hospital, Ahmedabad in the affidavit in reply filed in this Court. Moreover, the petitioner has already been admitted in P.G.Diploma course on the basis of that certificate and it was not objected that the certificate was not a legal one. As such, it cannot be said that the eligibility certificate issued to the petitioner cannot be treated as a certificate under Rules 4 and 5 in absence of any authorisation under the Rules and in absence of the averments made in the affidavit-in-reply.

9. The next contention of the learned counsel for the respondent nos. 1 and 2 is that the petitioner has made a claim on the basis of the reservation under the Act and backlog for the persons having disabilities and that claim is not available to her as the Post Graduation degree course has been commenced in the Institution in January, 2000 and it is stated in the counter-affidavit that graduation facility in Radioloty subject has been started in the Government Medical College, Surat from January,2000 and one M.D.Radiology registration has already been given to the resident of Government Medical College, Surat. In this respect, the contention of the learned counsel for the petitioner is that the Act has come into force from 1st

January, 1996. Section 33 of the Act requires that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class or persons with disability of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision (ii) hearing impairment (iii) locomotor disability or cerebtal palsy in the posts identified for each disability. Since the date of implementation of the Act, no person has been given the admission in Post Gradudation degree course. Hence, the petitioner is also entitled for admission on the basis of reservation and backlog also. In that connection, the learned counsel for the petitioner referred to the provisions of sections 36 and 39 of the Act which provide that where in any recruitment year any vacancy under section 33, cannot be filled up due to non availability of a suitable person with disability or for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability, provided that if the nature of vacandies in an establishment is such that a given category of persons can not be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

10. The learned counsel for the petitioner also pointed out from the affidavit-in-reply that the reservation for a person with disabilities has also been adopted by the Government from the year 1981 and it is stated that the residents of Government Medical College, Surat have been sent to B J Medical College, Ahmedabad for the Post Graduation course in Radiology from the year 1981 to 1999. Thus, it cannot be said that the Department of Radiology was started in the year 2000. Thus, the facility for the post gradudation course in Radiology subject was already available from the year 1981 and that separate facility has been given to the Government Medical College, Surat from the year 2000. Thus, similar facility was already available with the Institution. There is nothing on record to show that any reservation has been made to any person with disabilities in the post graduation course in Radiology. Thus, the contention of the learned counsel for the respondent nos. 1 and 2 has no force at all.

11. The learned counsel for the respondent nos. 1 and 2 further contended that the petitioner is seeking reservation in respect of the admission notified only for one person. In case such reservation is allowed, that would amount to 100% reservation belonging to reserved category and which is not permissible under the law. In this regard, she relied on the decision of the Supreme Court in the case of Post Graduate Institute of Medical Education and Research, Chandigarh vs. Faculty Association and others reported in AIR 1998, SC, 1767. I have carefully considered this contention of the learned counsel for the respondent nos. 1 and 2. The facts of the present case are totally different than those of the above decision of the Supreme Court cited by the learned cousnel for the respondent nos. 1 and 2. Whereas, in the present case, 22 seats were declared for admission in the Post Gradudate degree course, out of which, only the petitioner has claimed one seat on the ground of disability. Hence, the contention of the learned counsel for the respondent nos. 1 and 2 has no merit and it requires to be rejected.

12. The learned counsel for the respondent nos. 1 and 2 contended that the State Government cannot create any seat for admission and relied on the judgment of the Division Bench of this Court delivered on 27.11.2000 in Special Civil Application no.7410 of 2000 directing that in the event of the petitioner succeeding in the petition, the respondents shall accommodate the petitioner against one seat, if necessary, by creating one post. The Court has directed to create one post for 1st MBBS course for the persons having disabilities. The contentio of the learned AGP appearing for the respondent nos. 1 and 2 is that the State Government cannot be directed to create any supernumerary seat and that can be created only by the Medical Council of India. In this regard, the learned counsel relied on the decision of the Supreme Court in the case of Medical Council of India vs. State of Karnataka and others reported in AIR 1978, SC, 2423 wherein it has been held that it is the Medical Council/Dean which can prescribe the number of students to be admitted in the Medical course, degree course in Medical college or Institution. It is a Central Government alone which can direct the increase in the number of admission, but only on the recommendation of the Medical council. The Universities and the State of Karnataka had no authority to allow the increase in the number of admissions in the Medical College in the State. As such, the direction given by the Division Bench of this Court in the writ petition being Special

Civil Application no. 7410 of 2000 to the State Government for creation of a new one seat was not legal one, even the State Government has no power to create a seat. It is true that the State Government or Medical college cannot directly create any supernumerary seat for admission, but the State Government on feeling some difficulty can increase the number of seats with the approval of the Medical council of the India. In the facts and circumstances of any case, the Court can direct to create any supernumerary seat in any institution. Thus, the direction of the Division Bench cannot be said illegal.

13. It is also contended by the learned AGP that the petitioner has got an alternative remedy by way of making a complaint before Commissioner under section 62 of the Act. Under section 62 of the Act, the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into the complaints with respect to the matters relating to deprivation of rights of persons with disabilities and non-implementation of law,[rules, by-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Government and the local authorities for the welfare and protection of rights of persons with disabilities and he has been given a right to decide in accordance with the procedure laid down in other provisions of sections 63 and 64 of the Act. In my view, even if an alternative remedy is available, but if it is not an efficacious and alternative remedy, the Court can definitely entertain such kind of petition. In case the petitioner makes some complaint to the Commissioner he will consume much more time in deciding the complaint which will defeat the purpose of filing this petition by the petitioner and the petitioner would not be able to get required relief. As such, the alternative remedy would not debar the petitioner from moving this petition and this court cannot refuse to entertain the petition only on the ground of alternative remedy since the said remedy is likely to take much more time for getting the dispute resolved according to the procedure laid down in the Act. Moreover, the said contention is not raised in the counter-affidavit filed on behalf of the respondent nos. 1 and 2. Thus, the petitioner is not barred from moving this Court on the ground of alternative remedy which may be available to the petitioner under section 62 of the Act.

14. On behalf of the respondent nos. 4 to 7 learned counsel Mr. Supehia contended that they have no

objection if any seat is allotted to a person with disabilities, but there would be a disturbance as these seats have already been allotted on the basis of merits to some other students and in case this seat is reserved for the petitioner, the course allotted to other 178 students would be affected. The course allotted to them will have to be changed and it is not possible at this stage. It is also submitted that the publication of the notice no.1 of 2000 for admission in P.G. course has not made any provision for reservation of the handicapped persons. In case any seat is created as held by the Division Bench of this Court in the case of Special Civil Application no. 7410 of 2000, they have no objection at all, otherwise they will suffer an irreparable loss.

15. I have carefully considered the contentions raised by the learned advocates for the rival parties. The above Act provides for reservation at least for three persons with disabilities and that provision of the employment are also applicable for the admission of the disabled persons under the Act as held by the Division Bench of this Court in Special Civil Application no.7410 of 2000. The Act has been enacted in the year 1995. Neither Medical Council of India nor the State Government has taken any care to implement the said provisions of the Act since 1995. Hence, this Court has directed the State Government to create supernumerary seat for the petitioner of that petition. In the notification no.1 of 2001 for admission of 22 students for the Post Graduation course, the reservation for SC/ST and SEBC candidates has been provided, but no reservation has been made for the disabled persons. Under sections 33, 36 and 39 of the Act, the petitioner is therefore, entitled for the admission in the reserved seat for persons with disabilities. As no reservation has been provided since 1995 to the persons with disabilities and more particularly from tutor side, section 36 requires that the Government Department concerned to fill up backlog also. As stated above, the petitioner is therefore, entitled for the relief as claimed for and this petition deserves to be allowed.

16. Accordingly, this petition is allowed. The respondent nos. 1 and 2 are hereby directed to allot seat for admission in P.G.Degree course in Radiology subject to the petitioner as against reserved seat for persons with disabilities. In case, the respondent nos. 1 and 2 feel any difficulty in implementing this decision, the respondent nos. 1 and 2 are directed to create a supernumerary seat with the approval of the Medical Council of India within one month as directed by

the Division Bench of this Court in the petition being Special Civil Application no. 7410 of 2000. The respondent no. 1 is directed to permit the petitioner to continue her studies forthwith. Rule is made absolute accordingly with no order as to costs.

In the last, the learned AGP for the respondent nos. 1 and 2 requested to stay the implementation and operation of this judgment for a period of two weeks to approach the higher forum. This request cannot be acceeded to in the facts and circumstances of the case. Hence the request made by her is rejected.

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